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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-288

W. S. POTTS, et al., *Petitioners*

vs.

ARLENE FLAX, et al., *Respondents*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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OCTOBER TERM, 1972

No. ----------

W. S. POTTS, et al., *Petitioners*

vs.

ARLENE FLAX, et al., *Respondents*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

The Petitioners pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 14, 1972, and the order deferring the effective date of implementation entered July 27, 1972, and from the order of the Court entered July 28, 1972, which denied Petitioners' Motion for Rehearing. By such judgments, the United States Court of Appeals remanded to the District Court with directions that the desegregation plan of the Fort Worth Independent School District be modified and extended to eliminate 88% or more black attendance in schools which were previously white and became predominantly black not as the result of any official action, but rather as the result of unexpected dramatic demographic changes in the residential composition of the attendance areas of said schools. The

Court of Appeals further directed the elimination of the predominantly black attendance in a vocational high school open to all students in the school district, and in 3 other schools where such attendance is not the result of public or private discrimination, but rather the result of the residential pattern of the attendance areas and the desire of Negroes to live in their own neighborhoods rather than white neighborhoods.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, filed July 14, 1972, is not yet reported. *Flax v. Potts*, ... F.2d ..... (5th Cir. 1972) [No. 71-2715, July 14, 1972] The Opinion, the order to defer the effective date and the order overruling the Motion for Rehearing are attached hereto as Appendix A.

The Opinion of the District Court was entered on July 30, 1971. *Flax v. Potts*, No. 4205, July 30, 1971 (unpublished). A copy of same is attached hereto as Appendix B.

Reference is also made to the reported opinions in prior proceedings of this case in the District Court, *Flax v. Potts*, 333 F.Supp. 711 (N.D.Tex. 1970), and in the Court of Appeals, memorandum decision, *Flax v. Potts*, 450 F.2d 1118 (5th Cir. 1971).

The original proceedings were reported in *Flax v. Potts*, 204 F.Supp. 458 (N.D.Tex.1962) and *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963).

JURISDICTION

This is a desegregation case. The suit was brought under Title 28, Section 1331, Title 42, Sections 1981 and 1983, Title 28, Section 1343(3) of the United States Code and for an injunction under Title 28, Section 2202, United States Code and for a declaratory judgment under Title 28, Sections 2201 and 2202, United States Code.

Your Petitioners seek review of the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 14, 1972, of the order deferring the effective date of implementation entered July 27, 1972, and of the order overruling Petitioners' Motion for Rehearing entered July 28, 1972. No order granting an extension of time within which to petition for certiorari has been granted or requested.

The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28, United States Code (62 Stat. 928 (1948), 28 U.S.C. §1254(1)).

The decision of the Court of Appeals is in conflict with the decision of this Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). The decision of the Court of Appeals is also in conflict with the 10th Circuit in the case of *Keyes v. School District No. 1, Denver, Colorado*, 445 F.2d 990, 999 (10th Cir. 1971) cert. granted 404 U.S. 1036, 30 L.Ed.2d 728, ... S.Ct. ..... (Jan. 17, 1972).

This case involves important questions of Federal law which have not been, but should be settled by this Court, to-wit:

1. The Court below ordered the Trial Court to require the Board to assign and transport black students from a vocational high school to non-vocational high schools for "a full and equal integrated education." Such assignment would deprive the black students of a vocational education designed to train them to earn a livelihood upon graduation. Is there a constitutional duty on the part of the Board to deprive these black students of such training?

2. Because of the voluntary acceleration of the desegregation plan, 8 elementary schools changed from white to black without any action by the Board or any other state agency. Is there a constitutional duty on the part of the Board to re-mix these 8 schools?

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly interpreted *Swann* when it ordered the Board to go back and re-mix 8 schools which had changed from white to black after the dual system had been voluntarily eliminated by the Board. These schools changed because of demographic changes in a mobile, growing community. Such result was not brought about by any action on the part of the Board or any other state agency.

2. Does the Board have a constitutional duty to deprive the black students who voluntarily attend Terrell High School of a vocational education which will equip the students with the training to earn livelihoods upon graduation in order that the students may be bused and balanced?

3. Is the Board constitutionally required to revise its cluster program and bus the 1st grade students, that are presently attending integrated schools, when the only testimony in the record and the findings of the Trial Court establish that the present program is in the best educational interest of the students involved?

4. Three schools out of a total of 117 in the district are predominantly one race as a result of the desire of Negro parents to live in neighborhoods that are predominantly Negro. Neither such residential pattern nor the racial composition of such student bodies is the result of any public or private discrimination or official action. Does the Board have a constitutional duty to adjust the racial composition of these 3 schools, where any child desiring to attend any other school in the system may transfer and receive free transportation?

5. What is the effect of Section 803 of the Education Amendments of 1972 (Public Law 92-318, 92nd Congress, S. 659, June 23, 1972) where the inevitable result of the judgment of the Court of Appeals would require the District Court to enter an order requiring transfer or transportation of students from school attendance areas prescribed by competent authority for the purposes of achieving a balance among students with respect to race?

6. What standing or justiciable interest does the NAACP of New York have, and what right of any kind to prosecute this case where there is not a single school child, parent or taxpayer of Fort Worth who is a party plaintiff to this suit?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> "No State shall *** deny to any person within its jurisdiction the equal protection of the laws."

The Education Amendments of 1972 were signed into law by the President on June 23, 1972, and Section 803 thereof reads as follows:

> "Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with respect to race, sex, religion, or socioeconomic status, the effectiveness of such order shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired. This section shall expire at midnight on January 1, 1974."

STATEMENT OF THE CASE

Background

The Board does not have a long history of delays and resistance as in *Swann* and many other integration cases. See *Potts v. Flax*, 313 F.2d 284 - 287-288. See also the opinion of the Court of Appeals dated July 14, 1972, Appendix A, p. A-1,2. The Trial Court

and the Court of Appeals have in every instance made comment on the speed and good faith efforts of the Board to dismantle the dual system and comply fully with every requirement made by the Courts in the various steps of integration.

A 12-year "stair-step" desegregation plan was approved by the Trial Court in 1963. Immediately after the Court of Appeals rendered its opinion in 1963 [313 F.2d 284], the Board advised the Court that it desired to waive further appeal and requested that the mandate issue in order that the Board could immediately effectuate and accelerate its own plan of integration. The Board voluntarily accelerated the "stair-step" plan approved by the Court in the following manner. In 1964-65 the kindergarten, the 1st and 2nd grades and Trimble Technical High School were desegregated. In 1965-66 grades 3 through 6 were desegregated. In 1966-67 grades 7 through 9 were desegregated. In 1967-68 all remaining grades, viz. 10-12, were desegregated. From and after said dates no student has been denied the right to attend any elementary, middle school or high school because of race, color or location of his home.

This case was not called to the attention of the Trial Court from 1963 to 1970, during which period the voluntary acceleration of the integration plan was effected as pointed out above. Following the 1970 hearing [333 F.Supp. 711] the Trial Judge referred to the 1961 hearing noting that:

> "At the time of the trial [1961], the school board had to resist integration to avoid losing [accreditation] state school funds for the system and fines

against the board members under Article 2900a. It put up a good faith fight; but since the matter was decided by the courts, it has sincerely, earnestly and effectively tried to effectuate as soon as possible a unitary school system devoid of racial discrimination. There has been no dragging of feet or delay in making a genuine effort as there was in *Monroe v. Board of Commissioners of City of Jackson*, 1968, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733." [333 F.Supp. 711, p. 713 (N.D. Tex. 1970)]

The desegregation plan begun in 1963, and voluntarily accelerated to completion in 1967, included all grades and all programs as the Trial Judge in his 1970 opinion observed:

"* * * Since that time [1967], the school district has been operated as a bona fide unitary system, devoid of racial discrimination as to students, faculty, administrative staff and personnel, employees, athletics and other extracurricular activities and programs, and facilities. All that has been done smoothly and without fanfare through the earnest co-operation of members of all races, without hatred and the kind of trouble and turmoil that has been much too common in the past few years." [333 F.Supp. 711, p. 714 (N.D. Tex. 1970)]

No Party Plaintiffs

An unusual feature of this case is that we do not have a single student, black, white or brown nor a taxpayer or parent that is a party to this suit.

The original petition filed in 1959 recited that there were two black families, Flax and Teal, as parties-

plaintiff. Teal testified he was prosecuting this case on behalf of his own children and not for any other. Flax was silent on this point. The two black families have long since moved out of the picture, and no other children have been made parties. In the Trial Court and in the Court of Appeals we have repeatedly urged that there is not a single student, white, black or Mexican-American, nor is there a single parent or taxpayer in Fort Worth that is a plaintiff to this suit. The Trial Judge was correct when he found "that the NAACP (of New York) has been the real plaintiff all along." [Appendix B, p. A-15, Footnote 3]

We have no Negro plaintiffs as found in all of the other desegregation cases. In fact, we have no plaintiffs. Only the NAACP of New York is prosecuting this case. This organization is not a party to this suit, has no justiciable interest, and is without authority to prosecute a class action. It has no standing. *Flast v. Cohen*, 392 U.S. 83, 20 L.Ed.2d 947, 961, 88 S.Ct. 1942 (1968)

From *Brown*[1] through *Jefferson*[2] to *Swann*

On page 1 of the opinion of the Court of Appeals under date of July 14, 1972, we find the following language:

> "At the outset, we commend the Superintendent and the members of the Board for their dedication to their heavy responsibilities and their good faith voluntary efforts to desegregate and elimin-

[1]*Brown v. Board of Education of Topeka*, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873.
[2]*U.S. v. Jefferson County Board of Education*, 5 Cir., 1966, 372 F.2d 836.

> ate inequality in the school system. Moreover, they have cooperated in every way with the district court, including the formulation of a plan and the appointment of a bi-racial committee. On the other hand, the Appellants' objections have been numerous but their contributions have been negligible. [Appendix A, p. A-1, 2]
>
> • • •
>
> "Since that original court-ordered desegregation, [1963] the Board has traveled alone in the integration process. The Board has undertaken its obligations largely by the voluntary implementation of self-designed integration plans developed to keep the school district abreast of judicial progress toward equality in educational opportunity, from *Brown I* through *Jefferson County*, and finally to *Swann*." [Appendix A, p. A-3]

This lone journey traveled by the Board included the desegregation of the following: facilities, transportation, athletics, extracurricular activities, school constructions, transfer policy, bi-racial committee, closing of both white and black schools, recruitment of black teachers and administrators, merit system of promotion with objective standard test, maximum use of both state and Federal programs together with all other criteria suggested by the decisions of this Court and other Appellate courts, a teacher assignment ratio of 22% black, 78% white, being the exact ratio of the white-black teachers employed by the district. All of this has found approval of the Department of Health, Education and Welfare, as well as in every hearing before the Trial Court and the appeal before the Fifth Circuit. Concerning the integration of students, the following tools have been employed:

1. *Busing.* The district presently operates approximately 160 buses.

2. *Clusters.* Attendance assignments have been made deliberately to accomplish the transfer of Negro students out of formerly segregated Negro schools and transfer white students to formerly all Negro schools.

3. *Gerrymandering.* To accomplish greater integration.

4. *Equal Distant Zoning.* Designed to bring about more integration of both black and white.

5. *Closing of Schools.* 8 white and 6 black.

6. *Transfer Policy.* Majority-to-Minority with free transportation as suggested in *Swann.*

The opinion of the Court of Appeals makes it abundantly clear that the Court is satisfied with the accomplishments of the Board except as they relate to 16 schools which the Court has designated as "16 unjustified all-black, one-race schools."

The effective date of the Court's order was fixed as of the beginning of the school term 1972-73. On July 27, 1972, in response to a Motion to Stay, the Court entered an order extending the effective date as follows:

> "The last sentence of the opinion dated July 14, 1972, is amended to read, 'This shall be accomplished so that it may be put into effect for the second semester of the 1972-73 school term.' " [Appendix A, p. A-12]

The Schools Involved

It is important to analyze these 16 schools, for it is not enough merely to observe that they are predominantly one race. They fall into the following categories:

1. One elementary school, McCoy, was closed at the end of the 1971-72 school year and its pupils assigned to predominantly white schools beginning 1972-73.

2. Two middle schools, Como and Dunbar, are expected to have a substantial racial mix as a result of the operation of the cluster plan adopted in 1971-72. The exact determination of this fact can only be made after the beginning of the fall term August 24, 1972.

3. One high school, Terrell, a vocational school is open to all students in the district. It has no attendance area other than the area of the entire district. No students are assigned to this school. This is not a neighborhood school. The students attend this school because they are desirous of obtaining a vocational education. At Terrell the students receive vocational training designed to teach them how to earn a living after graduation. The training there is not offered at any other school in the district. Trimble Tech is a technical school and by reason of its crowded condition, it is not prepared to receive additional students. In the next place, the two schools offer different types of courses. Trimble is a technical school while Terrell is a vocational school. The remaining 11 high schools in the system offer academic courses. Terrell is now filled to capacity. Additional students could not be moved in without transferring students that are pre-

sently in attendance. To transfer students from Terrell is to deprive them of an opportunity for a vocational education.

4. Eight elementary schools, Dillow, Mitchell Blvd., Eastland, A. M. Pate, Morningside, R. Vickery, E. Van Zandt and Carroll Peak, and one middle school, Morningside, which gradually changed from predominantly white to predominantly black or were in a period of transition since this case has been pending, as a result of changes in the racial composition of the attendance areas serving such schools, said changes not having been brought about by any public or private discrimination, but rather by the very fact of elimination of racial discrimination in both housing and schools.

5. Two elementary schools, Dunbar and Carver, and one high school, Dunbar, that are predominantly black because of residential patterns of the community which were not caused or continued by any public or private discrimination but by the desire of Negroes to live in their own neighborhoods rather than predominantly white neighborhoods.

Effects of Judgment of the Court of Appeals

On the 17th day of July, 1972, three days after the Court rendered its decision under date of July 14, 1972, the Board estimated that from 70 to 80 buses would be required to implement the Court's order. Since that time more detailed study has been given to the subject and it is now estimated:

1. That 233 additional buses will be required.

2. That the acquisition cost of the buses would be $2,376,600.

3. That the operating cost for the first year will amount to approximately $1,461,600.

The district does not have the money and there is no way that it can get it. The order of the Court would impose an undue hardship on the Board.

4. That 233 additional drivers will have to be found, employed and trained.

5. That 4,800 miles will be traveled by the buses each day which will involve a minimum of travel time on the streets of the City of Fort Worth of 287 hours daily.

6. The longest distance that will be traveled by any student is 35 miles each way per day. The round trip will be 70 miles. This will involve students in the 9th grade. The longest time required for a student to remain on a bus will amount to 1 hour 10 minutes each way, or a total of 2 hours and 20 minutes each day. This will involve children in the 2nd grade.

THE QUESTIONS ARE SUBSTANTIAL

1. The Court of Appeals in its July 14, 1972, opinion has read into the Equal Protection Clause a complete paradox. Following the voluntary acceleration of the desegregation plan, 4 schools, Dillow, Mitchell Blvd., Eastland, and Pate, changed from all white to predominantly black between 1963 and 1970. Four other elementary schools; namely, Morningside, Vickery, East Van Zandt, Carroll Peak and Morningside

Middle School, have been in the process of changing from all white to predominantly black over a period of some 12 years. In neither instance have such changes been brought about by any action on the part of the Board or any other state agency, other than the affirmative action on the part of the Board to dismantle the old dual system. The Trial Judge said:

> "They have become predominately black as a result of desegregation instead of segregation." [Appendix B, p. A-39]

Now the Court of Appeals is directing the Trial Court to require the Board to desegregate these schools a second time. This is integration in reverse. This particular fact situation is, so far as our research discloses, one of first impression in this Court and we think that it is a question which should be settled by this Court.

2. A second serious Federal question is presented by the Order of the Court below which directs the Trial Court to require the Board to deprive black students of their right to attend Terrell High School and obtain a vocational education from which they may earn a livelihood. The order of the Court below would require that a sizeable number of the students in Terrell would be bused to non-vocational high schools which would deprive these students of an opportunity to obtain a vocational education. This is a question which should be settled by this Court.

3. If 88% of student integration is not a sufficient mixture, what percentage in terms of numbers will be exacted by the Courts?

4. Out of 117 schools in the system, four will remain predominantly black. Is this number unconstitutional?

ARGUMENT

The uncontroverted testimony of the Superintendent [Tr. 1971, p. 16, 17] and the findings of the Trial Judge [Appendix B, p. A-14] definitely establish that the schools in Fort Worth are genuinely nondiscriminatory. This conclusion has not been challenged. It has been ignored by the Court below contrary to Rule 52, F.R.C.P. The facts are that the Board voluntarily dismantled the dual system and that 8 elementary schools and one middle school changed from white to black through no effort on the part of the Board.

The unsound assumption of the Court below that the Board made no attempt to show that the schools were genuinely nondiscriminatory finds no support in the Record.

The Trial Court found as a fact:

> "The question of conversion to a racially unitary system is no longer in issue, as the school authorities voluntarily ordered complete desegregation of the system beginning with the 1967 fall term." [Appendix B, p. A-14]

Swann said:

> "The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." [28 L. Ed.2d at p. 571]

The testimony of the Superintendent supports the findings of the Trial Court that the changes were the result of demographic alterations in this highly mobile community rather than the result of any official action.

Terrell High

No student is assigned to Terrell High School. It is system wide. It is equipped with expensive tools and machinery for vocational training. It is manned by teachers with specialized teaching skills. It is available to every high school student in Fort Worth. The student body is composed of boys and girls who have an ambition to learn a vocational trade which will enable them to find a job after graduation. Must this group of boys and girls sacrifice their civil rights or be deprived of a vested right to attend the free public schools financed by taxes simply because they are black in order to obtain a racial balance?

> ". . . the State cannot condition the granting of even a privilege upon the renunciation of the constiutional right to procedural due process." *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150

Three Black Schools

The present plan of the Board leaves Carver Elementary, Dunbar Elementary and Dunbar High School predominantly black.

On page 572, *Swann* said:

> "In some circumstances certain schools may remain all or largely of one race until new schools

> can be provided or neighborhood patterns change. . . . In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system which still practices segregation by law."

The evidence is, and the Trial Court found:

> "There are several areas in widely scattered parts of Fort Worth which have heavy concentrations of Negroes; but that residential population pattern is something that lies beyond the jurisdiction of the school authorities." [*Flax v. Potts*, No. 4205, July 30, 1971 (unpublished) Appendix B, p. A-38]
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> • • •
>
> "The school authorities have the burden 'to satisfy the court that this [all or predominantly one-race schools] racial composition is not the result of present or past discriminatory action on their part.' *Swann*, 28 L.Ed.2d, at 572. The Court has carefully scrutinized the situation in regard to the schools in question, and is of the opinion that the school authorities have discharged that burden. The evidence shows beyond question that the racial imbalance in these few schools is due to neighborhood residential patterns, and not to state-enforced segregation." [Appendix B, p. A-39]

This Court held in *Swann:*

> "Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults." [p. 566]
>
> "It does not follow that the communities served by such systems will remain demographically

stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." [p. 575]

Como and Dunbar

The cluster plan adopted in 1971 is designed to bring about a proper mix of these two schools.

McCoy

This elementary school was closed at the end of 1971-72 term and the students have been assigned to a fully integrated school.

First Grade

In its eagerness to require total integration of every black school in Fort Worth, the Court below ignored the testimony of the Superintendent and the findings of the Trial Judge. They were dealing with and concerned with small children of a tender age while the Court below was dealing with and concerned only with abstractions. The Superintendent testified concerning the feeling of security for the little boys and girls entering school for the first time. Not all children attend kindergarten. He further expressed concern of the anxieties of the mothers for their children who are leaving home for the first time and in the event of illness or any other problems, the mother would be close at hand. The school authorities and the

Trial Judge thought this approach to be educationally sound. The order of the Court below would require that the children be bused. The facts are that many of these children will be bused from 10 to 20 miles from their homes. The first grade students are dismissed from school at noon or shortly thereafter while the other chidren who will ride the same bus are not dismissed from school until three or four o'clock. This presents only one of the many practical and serious problems. The position of the Court below is unrealistic and legally untenable.

Section 803 Education Amendments of 1972

The inevitable result of the holding of the Court of Appeals, if not reversed by this Court, would require the District Court to enter an order requiring transfer and transportation of students from school attendance areas prescribed by competent authority for the purpose of achieving a balance among students with respect to race. Under Section 803 of the Education Amendments of 1972, the implementation of such an order must be put off until final appellate review had occurred. This the Court of Appeals has failed to recognize in ordering it to occur at mid-term 1972-73.

Undue Burden

1. The order of the Court below would cast an undue burden on the students, the parents, the teachers, the administrative staff, the Board and the taxpayers.

2. The disruption to the educational program would be disastrous.

3. The financial burden would be insurmountable.

4. The public interest would not be served.

5. The Trial Court said:

> "This opinion ought to show on its face that the Court has given careful and detailed study to the school problem here involved in an effort to meet its responsibility under *Swann* to mould a 'reasonable, feasible and workable' plan 'to the necessities of the particular case.' The Court feels that the proposed plan, with the modifications herein mentioned, meets the test of operating under a racially unitary system with all vestigial effects of state-enforced discrimination eliminated. There is nothing in any of the cases that indicates that a school district has to be left in shambles to meet this test." [Appendix B, p. A-41]

COOPERATION REJECTED

In its brief (p. 33) filed in the Court below, the Board suggested:

> "The Courts and the Board are not adversaries. How best to achieve quality integrated education should be the question. The integrity of the Board and the Courts must be maintained."

This proffer of cooperation by the Board was completely rejected by the Court below. It was unwilling to work with the Board in its effort to continue an orderly program "to the necessities of the particular case." [*Swann*, p. 566]

Since there are no parties-plaintiff, the Court assumed the role of adversary. It repudiated the Board and the experienced Trial Judge (whose experience,

competence and integrity compares favorably with any member of the Federal judiciary). The Court below was composed of a panel of three judges. It was not an en banc decision. This panel followed the contentions urged by the activists, the NAACP of New York. It will be remembered that we pointed out above that this organization is not a party to this suit. It does not represent a client and it has no standing. Yet, the panel allied itself with this group, and blindly followed its contentions. It completely repudiated the Board, the school officials, the Trial Judge and the people who live in Fort Worth. Children are involved, black, white and brown. Fathers and mothers are anxious. A sincere Board is genuinely concerned. The only relief is for this Court to grant a writ.

CONCLUSION

WHEREFORE, the Board prays the Court to grant a writ of certiorari and that the judgment of the Court of Appeals be reversed and that the judgment of the Trial Court be affirmed.

Respectfully submitted,

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Counsel for Board of Education

CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of August, 1972, I served two copies of the foregoing Petition for Writ of Certiorari upon William L. Robinson, Esq., Counsel for Respondents, 10 Columbus Circle, Suite 2030, New York, New York 10019, by air mail, postage prepaid, and one copy upon Clifford Davis, Esq., Counsel for Respondents, 914 East Rosedale, Fort Worth, Texas 76104, by regular U. S. Mail, postage prepaid. I further certify that I have also served one copy of the foregoing Petition for Writ of Certiorari upon David L. Norman, Esq., Assistant Attorney General, Civil Rights Division, United States Department of Justice, Washington, D. C. 20530, and Frank D. McCown, Esq., United States Attorney, United States Courthouse, Fort Worth, Texas 76102, Counsel for Amicus.

Cecil A. Morgan

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 71-2715

ARLENE FLAX, ET AL, Plaintiffs-Appellants,
versus
W. S. POTTS, ET AL, Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

(July 14, 1972)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

DYER, Circuit Judge: Following *Swann v. Charlotte-Mecklenburg Board of Education*,[1] we remanded this case with directions that the District Court require the school board to forthwith constitute and implement a student and faculty assignment plan that would comply with the principles established by that decision. *Flax v. Potts*, No. 30495, June 15, 1971 (unpublished) [Flax I]. Subsequently the desegregation plan submitted by the Board was approved by the district court on July 30, 1971 and was implemented during the current school term. Appellants object to the plan as failing to achieve compliance with *Swann*.

At the outset, we commend the Superintendent and

[1]1971, 402 U.S. 1.

the members of the Board for their dedication to their heavy responsibilities and their good faith voluntary efforts to desegregate and eliminate inequality in the school system.* Moreover, they have cooperated in every way with the district court, including the formulation of a plan and the appointment of a bi-racial committee. On the other hand, the appellants' objections have been numerous but their contributions have been negligible. We must, nevertheless, once again remand the case because the record affirmatively shows that the plan has not yet fully established a unitary school system.

While the plan is effective in achieving a substantial amount of integration in the Fort Worth Independent School District, it falls short of meeting the mandate of *Swann* that all vestiges of state-imposed segregation be eliminated from the public schools. *Swann*, 402 U.S. at 15. This is because of the existence in the school system, during both the 1970-71 and 1971-72 school years, of 16 unjustified virtually all-black, one-race schools, relegating almost 12,000 of the approximately 21,000 black public school students in Fort Worth to a constitutionally proscribed segregated education.

The eleven year journey of the Fort Worth Independent School District along the path of school desegregation was begun in 1961 when the first action in this protracted litigation sought an end to compulsory segregation in the school system. In 1962 the

*This court held a prehearing conference with the attorneys for the parties and invited the litigants to appear pursuant to FRAP Rule 33. Counsel for appellants and appellees and members of the Board of Education were present at the prehearing conference.

District's dual school system was held to be unconstitutional and the Board was ordered to file a plan for desegregation. *Flax v. Potts*, N.D. Texas 1962, 204 F.Supp. 458, *aff'd Potts v. Flax*, 5 Cir. 1963, 313 F.2d 284. In 1963 the Board complied and the court approved a stair-step desegregation plan calling for the gradual, grade by grade integration of the Fort Worth schools. Since that original court-ordered desegregation, the Board has traveled alone in the integration process. The Board has undertaken its obligations largely by the voluntary implementation of self-designed integration plans developed to keep the school district abreast of judicial progress toward equality in educational opportunity, from *Brown I.*[2] through *Jefferson County*,[3] and finally to *Swann*. Following that decision, we found it necessary here, as in many of the school desegregation cases then pending before us, to direct the school board to revise its student assignment plan to meet its clearly defined constitutional obligations. They are the focus of this appeal.

We deal only with appellants' objections to the court-approved student assignment plan. While an objection was made on appeal to the Board's alleged failure to comply with our directive in *Flax I* that the decisions in *Singleton*[4] *and Carter*[5] be followed with

[2]*Brown v. Board of Education*, 1954, 347 U.S. 483.

[3]*United States v. Jefferson County Board of Education*, 5 Cir. 1966, 372 F.2d 836, *aff'd on rehearing en banc*, 1967, 380 F.2d 385, *cert. denied sub nom. Caddo Parish School Board v. United States*, 389 U.S. 840.

[4]*Singleton v. Jackson Municipal Separate School District*, 5 Cir. 1970, 419 F.2d 1211.

[5]*Carter v. West Feliciana Parish School Board*, 5 Cir. 1970, 432 F.2d 875.

reference to faculty assignment, appellants have not replied to the submission of the Board that our directive has been followed for the 1971-72 school term. We therefore pretermit discussion of that contention.

The School System

During the school years 1970-71 and 1971-72, there were 117 public schools in operation in the Fort Worth Independent School District, 78 as elementary schools, 20 as middle or junior high schools, and 15 as high schools. In 1970-71, there were 88,313 scholastics in the system, as compared with 84,311 during the 1971-72 term. While the population of Spanish-surnamed students in the system has remained fairly constant over this period (9.5%), the ratio of black to white children in the schools has varied from 27% - 64% in 1970-71, to 29% - 61% in 1971-72.

Since before 1954 school attendance zones and student assignments in the district were based upon a neighborhood school policy at each educational level, with the following exception. Prior to 1967, the school district was divided, although on a neighborhood basis, into "White" and "Black" districts. Generally, the system was composed of overlapping dual attendance zones in which each neighborhood was simultaneously in a white zone and a black zone. Where, however, blacks resided in a zone in which there was no black school, the black children were required to attend school out of their neighborhood zone at the nearest all-black school. The same was true of white children who lived in a predominantly black neighborhood in which there was no white zone or white school.

In 1967, this dual zoning was eliminated and a true neighborhood school plan implemented. Because, however, of marked residential separation of races in Fort Worth, little integration was accomplished by this revision in student assignment.

The Court-approved Plan

The first step in the Board's Comprehensive Plan was to adopt new elementary school attendance zones based on equidistant boundaries wherever predominantly black and predominantly white schools were contiguous. The minor adjustment in boundary lines occasioned by this change resulted in approximately 300 black children being moved into predominantly white schools.

The most significant provision of the new student assignment plan was the creation of elementary school "clusters" to include 27 of the District's 78 elementary schools. Each cluster consists of from three to seven schools operated as a unit, bringing together all black and white schools within its boundary and distributing their enrollment among the various facilities to achieve a ratio of black to white students that approximates the district-wide ratio. The 27 schools involved in the cluster plan included 11,000 students, 8,203 white and 2,797 blacks. There are 9,259 black elementary students presently enrolled in the Fort Worth Independent School District.

Finally, the Board's plan ordered the closing of previously all black Kirkpatrick and Terrell middle schools, the closing of previously all black Como and

Kirkpatrick high schools, the reassignment of all those students thereby affected to integrated facilities, and the adoption of a majority-to-minority transfer program.

The appellants' objection to the plan is its failure to eliminate the one-race schools that exist in the Fort Worth Independent School District. During the 1971-72 term, the Board operated 11 all-black (88% or more black) elementary schools,[6] two all-black high schools,[7] and three all-black middle schools.[8] There are 40 all-white schools in the system.[9]

All Black Schools

The existence of 11 all-black, one-race elementary schools in the 1971-72 term supported a segregated education for 6,415 of the district's 9,259 elementary age black children. These schools are not a part of the cluster program. Appellants seek their inclusion, contending that their continued operation as all-black violates the clear constitutional mandate that racial discrimination in public schools be eliminated "root and branch." *Green v. County Board of Education*, 1968, 391 U.S. 430, 438.

Swann teaches that the continued existence of one-race schools in a school system with a history of state-

[6]Morningside (99% black enrollment), R. Vickery (99% black), Dillor (90%), Mitchell Blvd. (85%), Eastland (88%), McCoy (100%), Dunbar (99%) Carver (99%), A. M. Pate (99%), E. VanZandt, (99%), and Carroll Peak (99%).

[7]I. M. Terrell High (100% black), and Dunbar (100% black).

[8]Dunbar Middle School (99.5% all black), Como Middle (100% black), and Morningside Middle (99.9% black).

[9]31 all-white elementary schools, 7 all-white middle schools, and 2 all-white high schools.

supported segregation is presumptively discriminatory, and places upon school authorities the obligation of showing that such schools are "genuinely nondiscriminatory." *Swann, supra*, at 26. There is no attempt here by the Board to make such a showing. Rather, the Board contends that it has no constitutional obligation to dismantle these all black schools because their racial composition occurred as a result of shifting residential patterns since the district's establishment in 1967 of what it maintains was a unitary school system. The Board seeks refuge in language from *Swann*, in which the Court said that:

> . . . Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.

Id. at 26.

But this language does not fit this case. There has never been a constitutionally adequate compliance by the district with its affirmative duty to create a truly unitary school system. Before and after 1967, nine of the eleven elementary schools were and are now virtually all-black schools. The vestiges of state-imposed segregation had in no significant manner been eliminated from the assignment of elementary school students. Likewise, the all black middle and high schools further reflected, and continue to reflect, adversely on the existence of a unitary school system. Thus, there was in 1967 no "elimination of racial discrim-

ination through official action," which is basic to the Court's suggestion in *Swann* that at some point in time the obligation to desegregate ends.

In speaking of the all black school, this Court has said that "where all-black or virtually all-black schools remain under a zoning plan, but it is practicable to desegregate some or all of the black schools by using the tool of pairing, the tool must be used." *Allen v. Bd. of Education of Broward County*, 5 Cir. 1970, 432 F.2d 362, 367. We have closely examined the location of the elementary schools in Fort Worth and find that it is both simple and practicable to include these all-black, one-race elementary schools in the cluster program. Indeed, they must be included, or an equally effective alternative remedy devised for the district to meet its constitutional obligation. *See Boykins v. Fairfield Bd. of Education*, 5 Cir. 1972,..... F.2d..... [No. 71-3028, February 23, 1972].

We have considered the Board's arguments to justify the existence of the virtually all black middle schools and high schools. Over 50% of the district's black middle school students, 2780 of 5547 attend three all-black middle schools (Dunbar, Como, or Morningside). Over 40% of the district's black students of high school age, 2522 of 6090, attend two all-black high schools. The Board's plea that the location of Dunbar High School in an "exclusive black neighborhood", and the technical school nature of Terrell, gives justification for their imbalance, is not persuasive. We leave to the district court's determination whether, as has been represented to us, two of the three all-black middle schools will become integrated

following their inclusion in cluster feeder plans in the 1972-73 school term. Otherwise, the student assignment plan must be revised to eliminate racial identifiability in these junior and senior high schools.[10]

Grades K-1

Another prong of appellants' objection to the Comprehensive Plan approved by the trial court is the non-inclusion of kindergarten and first grade students in the cluster program. We find no justification for the non-inclusion of first grade students. They are part of the normal curriculum of the district and entitled to a full and equal integrated education. We believe, however, that because of the peculiarities of the kindergarten program, the limited nature of its operation, and the tender age and special needs of its students, its elimination from the over-all student assignment plan is neither unreasonable nor constitutionally impermissible. *See Lockett v. Bd. of Educ. of Muscogee County*, 5 Cir. 1971, ____ F.2d ____ [No. 71-2490, August 30, 1971]. The kindergarten pupils will therefore continue to attend the elementary school nearest their home conducting a pre-school program. However, for the parents of those children who so elect, the majority-to-minority transfer provision of the Comprehensive Plan must be extended to the pre-

[10]Based upon enrollment statistics submitted to us by the school board, our determination that only 21,000 blacks are enrolled in the school system is somewhat at variance with the staistics which indicate that in the year considered, 1971-72, there were some 24,000 black students in the system. We have simply added the total enrollment of blacks in each school in the district listed on Board's Exhibit 3. We note these disparities but we find them not to be significant to this discussion.

school level to make the pre-school program in any elementary school in the district available, provided the parent can arrange for the transportation of his child to that facility.

New Construction and Renovation

In our original remand of this case following *Swann*, we directed the district court to enjoin the school board from "proceeding with the construction of a school that would be predominantly black." *Flax I*, *supra*. The order was designed specifically to prevent the construction of Morningside High School in a predominantly black area of Fort Worth. Relying upon assurances of the Board that it would comply with our directions, the district court has not issued such an injunction. We see no need for such an order in light of the good faith assurances by the Board to the court that such construction will not occur. *Swann* makes it clear that "in devising remedies where legally imposed segregation has been established, it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual system." *Swann*, *supra* at 21. The district court is charged with exercising continuing supervisory jurisdiction over the system and responsibility rests with it and the Board to insure respect for our decree against construction of segregated facilities.

The judgment of the district court is reversed and the case is remanded to the district court with directions that the plan be modified and extended to comply

with the principles announced in *Swann* as amplified by this opinion. This shall be accomplished so that it may be put into effect for the 1972-73 school term.

REVERSED and REMANDED WITH DIRECTIONS.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2715

ARLENE FLAX, ET AL, Plaintiffs-Appellants,
versus
W. S. POTTS, ET AL, Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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Before GEWIN, GOLDBERG and DYER, Circuit Judges.

BY THE COURT:

The alternative motion of the appellees to defer the effective date to accomplish the directions of this Court on remand to modify and extend the present plan is GRANTED.

The last sentence of the opinion dated July 14, 1972 is amended to read,

> "This shall be accomplished so that it may be put into effect for the second semester of the 1972-73 school term."

United States Court of Appeals

FIFTH

EDWARD W. WADSWORTH
CLERK

ROOM 408-400 ROYAL ST
NEW ORLEANS, LA. 70130
(504) 527-6514

OFFICE OF THE CLERK

July 28, 1972

TO ALL PARTIES LISTED BELOW

Re: No. 71-2715 — Arlene Flax, et al, vs. W. S. Potts, et al

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth,
Clerk

By /s/ Alvis M. Winchester
Deputy Clerk

/amw
cc: Mr. Cecil Morgan
Mr. L. Clifford Davis
Messrs. Wm. L. Robinson
Norman J. Chachkin

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

CIVIL ACTION NO. 4205

ARLENE FLAX, ET AL
VS.
W. S. POTTS, ET AL

MEMORANDUM OPINION

This class action was filed years ago to bring about desegregation of the school system operated by the Fort Worth Independent School District. The question of conversion to a racially unitary system is no longer in issue, as the school authorities voluntarily ordered complete desegregation of the system beginning with the 1967 fall term.[1] The only matter now before the Court is whether the mechanics of implementation in regard to faculty and student body satisfy the requirements of cases decided after the conversion to the unitary system.

This school system was being operated under a stair-step plan of desegregation put into effect under court order at the start of the 1963 fall school term when the Fifth Circuit decided United States vs. Jefferson County Board of Education, 380 F. 2d 385

[1]Singleton v. Jackson Municipal Separate School Dist., 5 Cir., 419 F. 2d 1211, 1217 (1970).

(1967).[2] The school board, which had been accelerating the stair-step plan beyond court-order requirements each year, reacted promptly to the decision in the Jefferson County case by ordering complete conversion to a racially unitary system beginning with the 1967 fall school term. Since that time, the school district has been operated as a bona fide unitary system devoid of racial discrimination as to facilities, students, faculty, administrative staff and personnel, other employees, athletics and other extracurricular activities and programs.

The mechanics of the operation of the unitary system met no serious opposition from the plaintiffs[3]

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[2]Some of the language used in the summary of the background facts in this memorandum is taken from one or the other of two prior memorandum opinions in this case written by the author hereof. See opinion dated March 1, 1962, Flax v. Potts, 204 F. Supp. 458, and opinion dated August 28, 1970, 333 F. Supp. 711. That language is repeated herein without the use of quotation marks. The findings of fact in such of the language of the prior opinions as is brought forward here have not been questioned. Some of the background facts in the present opinion are based upon judicial notice of prior proceedings in this case. (Romero v. Frank's Casing Crew & Rental Tools, Inc., D.C. La., 229 F. Supp. 41, affirmed, 342 F. 2d 999; Traders & Gen. Ins. Co. v. Rhodebarger, Tex.Civ.App., 109 SW 2d 1119, err. dis.), of census figures (600 California Corp. v. Harjean, D.C. Tex., 284 F. Supp. 843, 854), and of matters of geography and common knowledge within the Court's jurisdiction (A.T.&S.F. Ry. Co. v. United States, 284 U.S. 248, 260, 52 S.Ct. 146, 76 L.Ed. 273; Dayton P. & L. Co. v. Public Utilities Commission, 292 U.S. 290, 311, 545 S.Ct. 642, 78 L. Ed. 1267, 1281; and 600 California Corp. v. Harjean, supra, at pp. 854-55).

[3]This suit has been on file more than ten years. The original named plaintiffs have long since faded out of the case, as have the individuals first named as defendants. Continuity has been maintained, however, through the fact that all hearings have been held by the judge who is the author of this opinion, that the NAACP has been the real plaintiff all along, and that Clifford Davis, attorney for the plaintiffs, and Cecil Morgan, attorney for the defendants, have served ably in those capacities continuously from the time of the first hearing in 1961.

until the school board yielded to the insistence of the black people in the Morningside area that it proceed to build a high school in their community. The bonds had been voted for it when the zone was predominantly white, and the black people who took over occupancy there in a relatively short period following the bond election were insisting that there would be racial discrimination against them if the plans for the school were abandoned. When the construction of the school was ordered in the first part of 1970, the NAACP filed a pleading in this action opposing it. They also prayed in general terms for "further relief" in relation to the implementation of the unitary system. This Court felt that the people of the Morningside community were entitled to their school for which money had been allocated when the residents there were predominantly white, and that there was nothing wrong with the mechanics of the operation of the unitary system under the decisions in effect at that time. Judgment was entered accordingly on August 28, 1970, and the plaintiffs appealed. That was the first appeal in this case since the one from the original judgment entered on March 1, 1962.

Swann v. Charlotte-Mecklenburg Board of Education,..... U.S. ....., 91 S. Ct. ....., 28 L. Ed. 2d 554 (1971), and the related cases[4] were decided while the appeal from the 1970 judgment above mentioned was pending; and, on June 15, 1971, the Court of

[4]Davis v. Board of School Commissioner, ... U.S. ....., 91 S.Ct. ....., 28 L. Ed. 2d 577 (1971); McDaniel v. Barresi, ... U.S. ....., 91 S.Ct. ....., 28 L. Ed. 2d 582 (1971); and North Carolina Board of Education v. Swann, ... U.S. ....., 91 S.Ct. ....., 28 L. Ed. 2d 586 (1971).

Appeals vacated and remanded the 1970 judgment only insofar as it related to student and faculty assignments and to the construction of the new high school, with directions that:

1. The Court should require the school board "to constitute and implement a student assignment plan and a faculty assignment plan that complies with *Swann v. Charlotte-Mecklenburg Board of Education*, 1971, ... U.S. ....., ... S.Ct. ....., 28 L. Ed. 2d 554 [No. 281, April 20, 1971]; *Carter v. West Feliciana Parish School Board*, 5 Cir., 1970, 432 F. 2d 875, and *Singleton v. Jackson Municipal Separate School District*, 5 Cir., 1970, 419 F. 2d 1211, insofar as they relate to the issues in this case." (There was no indication as to what, if anything, the Court of Appeals thought was wrong with the student body and faculty policy then in force, but the matter has now been considered anew in the light of the cases cited).[5]

2. The Court should require the school board "to file a semi-annual report during the school year similiar to those required in United States v. Hinds County School Board, 5 Cir., 1970, 433 F. 2d 611, 618-619."

3. The Court should enjoin the school board "from

[5]The Court of Appeals took similar action in regard to school cases pending on appeal at the time of the landmark decision in Alexander v. Holmes County Board of Education, 396 U.S. 19, 90 S.Ct. 29, 24 L. Ed. 2d 19 (1969) – "Because of Alexander v. Homes County, each of the cases here, as will be later discussed, must be considered anew either in whole or in part, by the district courts . . . " Singleton v. Jackson Municipal Separate School District, 5 Cir., 419 F. 2d 1211, 1216 (1970).

proceeding with the construction of any school that would be predominantly black."

After the receipt of the mandate, the Court held an informal conference with the attorneys for the respective parties. The adjustments necessary to make the implementation of the unitary system as to faculty and students meet the requirements of the late cases cited by the Court of Appeals were discussed at length, and the school board was directed to prepare and submit a plan. The Court was of the opinion that the first plan the board thereafter submitted was not adequate[6]; and entered an order to the effect that if an acceptable, comprehensive plan were not submitted within one week thereafter, an outsider would be appointed to prepare one. The second plan was submitted within time; and, after an all day hearing, the Court reached the opinion that it should be adopted with the modifications hereinafter set out.

Before going into the merits of the plan in the light of *Swann*, it is well to notice the difference in the backgrounds of the Fort Worth school system and those involved in *Swann* and the related cases. At the outset of his opinion in *Swann*, Chief Justice Burger said: "This case and those argued with it arose in states having a long history of maintaining two sets of schools in a single system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race . . . " 28 L. Ed. 2d, at 560-61, Later in the opinion, he mentioned that conversion to unitary systems in the 15 years since

[6]Some members of the school board shied at busing. None of the present board members has offered any objection to desegregation.

Brown II. had been made extremely difficult in many places by dilatory tactics and deliberate resistance of court mandates.[7] There have been no such problems with the school authorities in this case. Fort Worth has always been more under the influence of the philosophy of the West[8] than of the Deep South. As "The City where the West Begins", it has not had the racial problems of its neighbors to the east and south. A friendly relationship has existed between the whites and the blacks, and there has been no general racial bitterness or strife here. A bi-racial committee of white and Negro civic leaders was formed shortly after entry of the original judgment in this case in 1962. Under their leadership, all of the public facilities in Fort Worth were integrated at the time the first school desergregation plan went into effect in 1963. It is true that when this case was first heard, the school district had always been operated under the dual system. At that time, there was in force in Texas a statute which provided that no school authority in this State had the right to abolish the dual public school system in its district unless authorized by a prior vote of the electors of the district. The penalties provided for violation were loss of state funds for the school district, loss of accreditation for

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[7]". . . Deliberate resistance to some of the Court's mandates has impeded the good-faith efforts of others to bring school systems into compliance. The detail and nature of those dilatory tactics have been noted frequently by this Court and other courts." 28 L. Ed. 2d, at 565.

[8]Desegregation was welcomed in many school districts in the area of Texas beginning a short distance west of Fort Worth. They did not have enough Negro pupils to justify a dual system, and the maintenance of such a system was an undue financial burden on them. They made a complete conversion to a unitary system as soon as the obstacle of Art. 2900a was removed.

the pupils of the district, and fines ranging from $100.00 to $1000.00 for each of the offending school authorities.[9] By virtue of an opinion of the Attorney General of Texas, however, the penalties were not being enforced against a school district which desegregated pursuant to a court order.[10] It was generally understood that the Attorney General had reference to an order entered after bona fide, not token, resistance. The school authorities here put up enough resistance in the first trial in 1961 to avoid the possibility of the statutory penalties; but as soon as the Court of Appeals handed down its decision on[11] on February 6, 1963, affirming the judgment[12] of this Court ordering desegregation, they advised the appellate court that they desired to waive the right to proceed further with their appeal, and requested that the mandate be issued forthwhith. They have consistently done much more than they were ordered to do ever since. HEW has never found fault with their system. Prior to the decision to begin the construction of the high school in Morningside, the NAACP, in spite of its periodical checks, had come to this Court with only one question which reached a hearing; and the evidence showed that there was no merit in that complaint. The conversion to the unitary system in 1967 came ahead of schedule and without any pressure from outside sources. All this was done smoothly and without fan-

[9]Art. 2900a, Vernon's Ann. Tex. Civil Statutes. This statute is quoted in full in Flax v. Potts, D.C. Tex., 204 F. Supp. 458, 466 (1962). It was declared unconstitutional after the first trial of this case.

[10]See Brown v. Rippy, 5 Cir., 285 F. 2d 43 (1961), footnote 13.

[11]Potts v. Flax, 5 Cir., 313 F. 2d 284 (1963).

[12]See Flax v. Potts, supra, footnote 9.

fare through the earnest co-operation of members of all races, without hatred and the kind of trouble and turmoil that has been much too common in the past few years.

The population of Fort Worth proper is about 393,-455, and of its metropolitan area, about 762,090. The Fort Worth Independent School District encompasses all of the City of Fort Worth and some of the neighboring urban communities; but it takes in no rural area. The district is irregularly shaped geographically, with the longest distance across it in an easterly-westerly direction being about 22 miles, and in a northerly-southerly direction, about 13 miles. It has an area of approximately 176 square miles. There are 117 schools in the system. 78 of them are elementary schools (kindergarten and grades 1 through 5). 20 of them are middle schools (grades 6 through 8). 15 of them are high schools (grades 9 through 12). The others are either vocational training or specialty class schools. The latter type offers help for handicapped children and both basic education and evening high school classes for adults. The total number of pupils in the school system is 86,109, of which 63,407 (about 74%) are white and 22,702 (about 26%) are black.

Under the dual system that existed prior to the time the plan for integration was adopted and ordered in May, 1963, the school district operated one group of schools designated specifically for white pupils and another for Negroes. The keystone of that system was a set of attendance-zones for the Negro schools separate from the one for the white schools. The attendance-zone plan called for a pupil to attend

the school provided for his race in the zone of his residence. The zones for the white pupils were determined by the factors generally accepted by educators as being for the best interests of school children. If there had never been any *de jure* racial discrimination, those zones would have to be considered fair to all the pupils living therein. It was different as to the separate set of zones for children of the Negro race. The white pupils outnumbered them about 3 to 1, so the Negroes had fewer schools and larger zones. Although each set of zones, as a whole, covered the same total area, the boundaries of the individual zones for the Negro schools did not coincide with those for the white schools. The larger zones for the Negro schools overlapped the smaller zones for the white schools, and sometimes one zone for Negroes covered at least part of several zones for whites. One of the results was, to use the langauge of the plaintiffs' original complaint in this case, that Negro children were denied the right to attend the school "nearest their home on a non-segregated basis while non-Negro pupils are permitted to attend the school nearest their homes."

The school authorities implemented the conversion to the unitary system in 1967 by use of a combination of court-approved methods. The separate sets of schools for Negroes and whites and the attendance zones for Negro pupils were abolished. That left the attendance zones which had been theretofore set up for the white pupils, and which were for the best interests of all the school children, regardless of race, residing in the various zones. Where possible, ad-

justments were made in zone boundary lines. No racially motivated zones were left. Fair and equitable feeder patterns for middle schools and high schools having no relation to race, were established. Liberal option and majority-to-minority transfer policies were adopted. Some all white schools and some all black schools were phased out where the action was consistent with sound educational policy. The administrative staff and supporting personnel, the faculty and other school employees, all services and facilities, and the entire athletic and extracurricular programs have all been desegregated. Since the beginning of the 1967 fall school term, no person—pupil or adult—has been denied any opportunity or service of the school system on account of race or color.

During most of the period since 1967, the school authorities were acting without the aid of any case giving a comprehensive set of guidelines for implementing conversion from a dual to a unitary system. *Swann*, decided about three months ago, provides that set. The particular guidelines applicable to faculty assignment plans and to student assignment plans, respectively, will be considered in that portion of this opinion dealing with the proposed plan of the school board. The fundamentals mentioned in the following quotations from *Swann* are pertinent to the consideration of any school desegregation plan in whole or in part:

> "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation . . . " 28 L. Ed. 2d, at 566.
>
> ". . . [S]chool authorities are 'clearly charged

with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.' " 28 L. Ed. 2d, at 566.

"If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked . . ." 28 L. Ed. 2d, at 566.

" 'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case . . . ' " 28 L. Ed. 2d, at 566.

". . . Conditions in different localities will vary so widely that no rigid rules can be laid down to govern all situations." 28 L. Ed. 2d, at 574.

"School authorities are traditionally charged with broad power to formulate and implement educational policy . . . To do this [prescribe ratio of Negro to white people in each school reflecting the proportion of the district as a whole] as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constiutional violation, however, that would not be within the authority of a federal court . . . " 28 L. Ed. 2d, at 566-67.

"We are concerned in these cases with the elimination of the discrimination inherent in the dual system, not with myriad factors of human existence which can cause discrimination in a multitude of ways on social, religious, or ethnic grounds . . . The elimination of racial discrimination in public schools is a large task and one that should not be retarded by effort to achieve broader purposes lying beyond the jurisdiction of school authorities . . . It would not serve the important

objective of Brown I. to seek to use school desegregation cases for purposes beyond their scope, although desergregation of schools ultimately will have impact on other forms of discrimination . . . " 28 L. Ed. 2d, at 570.

"Our objective in dealing with the issues presented in these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools." 28 L. Ed. 2d, at 570. (This was in connection with the discussion of racial balances and quotas).

"At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in Brown I. The systems will then be 'unitary' in the sense required by our decisions in Green and Alexander." 28 L. Ed. 2d, at 575.

"It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial

composition of the schools, further intervention by a district court should not be necessary." 28 L. Ed. 2d, at 575-76.

The School Plan in General

The plan submitted by the school board covers all the matters set out in the judgment of the Court of Appeals remanding the case. The only objection to the plan as a whole is that it proposes that the effective date be January 31, 1972. That was because it was contemplated that the 23 additional buses needed to implement the student assignment plan could not be obtained before that time. There is such an understandable demand for school buses now that delivery on them cannot be had until six to eight months after they are ordered. The superintendent of schools testified that the local transit company had agreed to lease 10 of its older buses to the school district pending delivery of the new buses. While they are not in good repair, it is believed that they can be put in usable condition in the period of more than one month before the next term of school starts. It is not unreasonable to believe that the remaining 13 buses can be leased from other sources for the interim period. The school authorities must use the utmost diligence to get them. The proposed plan will be modified so as to become effective at the beginning of the 1971 fall school term. That modification will cure the objection above mentioned.

The only other objections are directed at the portions of the plan dealing with faculty and staff assign-

ments and student assignments. They will be discussed in connection with those matters.

The only witnesses who testified on this hearing were Superintendent Truelson and Dr. Crowley. Truelson was offered by the defendants as an expert witness on school administration and education, and Crowley was offered in the same capacity for the plaintiffs. When all the recognized standards of credibility were applied, Crowley's testimony did not impress the Court.

Faculty and Staff Assignment Plan

There has been no racial discrimination in regard to teachers and staff since the conversion to the unitary system. The school authorities have made a sincere attempt to hire as many qualified Negro teachers as possible. For the past several years, the administrators in the system have gone to at least 40 universities and colleges annually to interview prospective graduates for teaching jobs, with special effort directed to those of the Negro race. Most of the schools in the system have had racially mixed faculties in spite of the fact that demand for qualified Negro teachers has far exceeded the supply, due to the keen competition for them from other schools and from industry. However, *Swann* and *Singleton* hold that a vestigial effect of racial discrimination under a dual system is that the faculty and staff assignment plans which have generally been followed after dismantlement of the dual system are still calculated to give the appearance that some of the schools are intended to be operated preferably for one particular race,

either white or black.[13] *Singleton* states that the faculty and staff working directly with the pupils of a public school should be "so assigned that in no case will the racial composition of a staff indicate that a school is intended for Negro students or white students." 419 F.2d, at 1218. See also *Swann*, 28 L.Ed. 2d, at 568. These cases say that in order for school districts once operated under the dual system to achieve this objective, they should adopt as an initial step a plan of faculty assignment in each school with a ratio of white to Negro faculty members substantially the same throughout the system." *Swann*, 28 L. Ed. 2d, at 568.[14] It is not contemplated that this ratio will be frozen. Singleton establishes this merely as one of the necessary steps[15] in the desegregation of the faculty of a district converting from a dual to a unitary system. It is intended that when the desegregation is accomplished, the faculty and staff policy will operate under a racially non-discriminatory merit system based upon reasonable, objective standards.[16]

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[13]This applies only to school districts which once operated under the dual system.

[14]*Singleton* expresses the same thought in the following language: " . . . For the remainder of the 1969-70 school year the district shall assign the staff described above so that the ratio of Negro to white teachers in each school, and the ratio of other staff in each, are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system." 419 F. 2d, at 1218.

[15]*Singleton* was decided in December, 1969. As shown in footnote 14, it provided that the initial ratios should be maintained only for the balance of the 1969-70 school year.

[16]" . . . The *Singleton* requirement . . . does not contemplate freezing the faculty ratio which is present when faculty desergregation takes place in the system. It contemplates rather that faculty desegregation will be accomplished by invoking the system-wide ratio as a rule for each particular school in the system and that thereafter the system will function from the standpoint of faculty and staff on the merit

The proposal of the school board now before the Court presents a faculty and staff assignment plan which substantially tracks the detailed policy set out in *Singleton* under the heading, "DESEGREGATION OF FACULTY AND OTHER STAFF." See 419 F. 2d, at 1217-18. The system-wide racial ratio of the faculty and staff in the school district is 78% white and 22% black. The board proposes to establish that ratio in each school in the entire system, with no more than 12% tolerance above and below. The plan then follows the comprehensive provisions of the policy set out in *Singleton* for the future operation of the faculty and staff under a merit system based on reasonable, objective standards. The Court is of the opinion that the school board's proposed plan, with the modification hereinafter mentioned, meets the requirements of *Swann*, *Singleton* and *Carter*.

The plaintiffs object to the proposed plan on three grounds: (1) There is no provisions for notice, hearing and a copy of the charges for a teacher facing discharge or release. (2) The plan does not give the objective criteria to be used in promotion, demotion and dismissal of members of the faculty and staff. (3) The 12% tolerance above and below the 78%-22% ratio should not be allowed.

The first objection would be well taken if it were not for the provisions of Subchapter G. of the Texas Education Code, Acts 1969, 61st Legislature, Chap-

system. This means that *once a unitary system has been established the system-wide racial ratio may thereafter change from time to time as a result of objective merit standards in the selection and composition of faculty and staff.*" Carter v. West Feliciana Parish School Board, 5 Cir., 432 F. 2d 875, 878 (1970) (Emphasis added).

ter 889. Various statutes in that Subchapter contain detailed provisions for the grounds of discharge and release of teachers, for written complaint to be given to them, for hearing after due notice, and for the right to be represented by counsel. These statutes are more than adequate; and while they would be necessarily read into the plan, the order approving the plan will expressly provide that they are.

The second objection relating to the failure of the plan to include the non-racial objective criteria to be used in case of promotion, demotion or dismissal is moot in view of the Court's order entered in connection herewith. The following is quoted from the board's plan: "Prior to such a reduction, the school board will develop or require the development of non-racial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria will be available for public inspection and will be retained by the school district. The school district will also record and preserve the evaluation of staff members under such criteria. Such evaluation will be made available upon request to the dismissed or demoted employee." The plan will be modified by providing in the Court order that such objective criteria shall be developed and made a part of the public records of the school system, and a copy filed in this case, on or before the beginning of the 1971 fall school term.

The objection to the provision for a tolerance of no more than 12% above and below the 78%-22% ratio has no merit. Defendant's Exhibit 1 shows that a number of elementary schools have less than 15 teachers

on their staffs. Some of them have as few as 6. It would be impossible to apply the 78-22 ratio to each staff and come out with all whole teachers of each race. For instance, a strict application of the ratio to a staff of 10 teachers would result in 7-8/10 white teachers and 2-2/10 black teachers. That the courts realize the impossibility of applying the exact system-wide racial ratio to the faculty of each school in a district is evidenced by the language in the last quotation above from *Swann*, which shows that the Supeme Court approved "a plan of faculty assignment in each school with a ratio of white to Negro faculty members *substantially the same* throughout the system." 28 L. Ed. 2d, at 568 (Emphasis added). A plan for school desegregation has to be "reasonable, feasible and workable." *Swann*, 28 L. Ed. 2d, at 575, and a faculty assignment plan based on racial ratios has to have a reasonable tolerance to meet those requirements. The 12% above and below the 78%-22% ratio is not unreasonable. In the elementary schools with small staffs, a variance of one teacher in an effort to get away from fractions can run the percentage up or down substantially. Defendants' Exhibit 1 shows the proposed teaching staff of each school by numbers under the board's plan. The Court finds nothing unfair about it. If unfairness in the application of the proposed teacher and staff assignment plan should develop, the Court, with its continuing jurisdiction, can remedy it.

Student Assignment Plan

It has been mentioned earlier that since the beginning of the 1967 fall school term no pupil has been ex-

cluded from any school in the district or been denied any opportunity or service of the school system on account of race or color. The school authorities have made a sincere effort to implement desegregation of the student body by use of court-approved techniques. Eight formerly all white schools and four formerly all black schools have been phased out, and the students of those schools have been assigned to schools where the result would be better racial balance. The school system has followed the policy that, with two exceptions,[18] a pupil in elementary school was required to attend the elementary school in the zone in which he resided.[19] That was on account of the problems of getting children of such tender years to and from school safely. Liberal option and transfer policies available to pupils have been provided to relieve the problem of racial imbalance in residential areas where the residential situation resulted in a predominance of Negro pupils. The transfer policy applied to pupils of all ages, but the option policy was available only to pupils in middle and high schools. They were patterned after those set out in United States v. Jefferson County Board of Education, 5 Cir., 380 F. 2d 385, 390-93 (1967). At appropriate times, the school authorities brought them to the attention of the students in person and to the parents by letter. They were also pub-

[18]The two exceptions were: (1) where the school nearest the pupil's home was in an adjoining zone; and (2) where a transfer was granted at the request of the parent based on the best interest of the child. Racial motivations could not be involved in the last exception. The transfers were usually requested in cases where a school in another zone was close to the place where the mother worked.

[19]A special effort has always been made to have each elementary school in the zones which now exist so located that it would not be over ¼ to ½ of a mile distant from the home of any of its pupils.

licized in newspapers of general circulation in the district. When a child completed his work in elementary school, he was given the option[20] of attending any one of two or more middle schools. When he finished his courses in middle school, he had the option[21] to attend any one of three or more high schools. If the election was not to exercise the option, the feeder system sent him to the middle school designated for graduates of his elementary school, or to the high school designated for graduates of his middle school, as the case might be. The middle schools and high schools embraced in the option available to children in any zone in the district included schools where the child exercising the option could become a part of a student body composed predominantly, or in some cases about equally, of members of the opposite race. The option policy was supplemented by a transfer policy under which a parent might make a request for transfer of his or her child to a school to which the child was not otherwise eligible, provided race,[22] color, whim or dislike of teacher was not the reason for the request. That policy has been liberally construed and applied. No request for transfer of a Negro pupil from a predominantly Negro school to a predominantly white school has been denied. At the time the plaintiffs filed their motion for further relief about a year ago, the school district had achieved substantial, not just token, integration of its student body by the use of the above described tech-

[20]This option was required to be exercised by the parent.

[21]This option was likewise required to be exercised by the parent.

[22]This provision kept a white parent from seeking to transfer his child from a school having a substantial number of black pupils.

niques. The situation continued to improve to the date of the last hearing.

One of the quotations from *Swann* in an earlier part of this opinion says that the objective of desegregation is to "eliminate from the public schools all *vestiges of state-imposed segregation.*" 28 L. Ed. 2d, at 566 (Emphasis added). Insofar as the student body of this school system is concerned, the last vestiges of state-imposed segregation are 6 predominantly Negro elementary schools where the racial imbalance is due to the continuing effect of the now dismantled dual system. The school board plan seeks to counteract that effect and eliminate such vestiges of segregation by employment of the following techniques recognized in *Swann:* (1) Creation of six clusters of elementary schools, each of which will contain one of the above mentioned 6 predominantly Negro schools. (2) Closing of 2 predominantly black middle schools and assignment of the pupils from them to schools not suffering from the continuing effect of previous segregations. (3) Adoption of new elementary zones based on equidistant boundaries adjusted for building capacity and conformity to streets. (4) Adoption of majority-to-minority transfer rule with provisions to furnish transportation and to make space available in transferee schools. (5) Adoption of a provision to prohibit transfers for students living in cluster zones except under majority-to-minority transfer rule. (6) Reassignment of black students from recently closed Como and Kirkpatrick High Schools and extension of south boundary of Eastern Hills High School.

The cluster plan is the only one of these techniques

which needs much explanation. The following is quoted from the proposal by the school board:

"CLUSTERS

— 1 —

"The school district proposes the creation of six 'clusters' involving 27 elementary schools. Each cluster consists of from three to seven elementary schools that will be operated as a unit to achieve additional desegregation. In essence the cluster plan takes the elementary school that has been attended by predominantly black students and groups such school with the requisite number of elementary schools that have been attended by predominantly white students. The result will be that the ratio of black to white students in each school in the cluster will approximate the overall ratio of black to white students in the entire school district. The cluster plan will involve 27 schools and 11,000 students, of whom 2,797 are black and 8,203 are white.

— 2 —

"State-funded transportation will be made available on a racially nondiscriminatory basis for all students who are eligible (live more than two miles from assigned school). Most of the students affected by the cluster plan will be eligible. This will require the purchase of approximately 23 buses. The school district is required to place orders for the purchase of buses through the Texas Board of Control in Austin. A minimum of six to eight months is required to receive delivery. Implementation of the cluster plan is, therefore, proposed to be made at the beginning of the

school term next after delivery of the necessary, and presently unavailable buses.

— 3 —

"It should be noted that since middle school and high school attendance is fundamentally based upon prior elementary school attendance, the cluster plan above outlined for elementary schools will inevitably increase the racial balance of the middle and high schools."

These clusters are shown on the map of the school district admitted in evidence as Defendants' Exhibit 3. The map is made a part of the proposed plan as an exhibit thereto. The particular clusters are explained in detail in Mr. Truelson's testimony at pp. 40-50 of the trial transcript.

"Clustering" or "grouping" of schools is a technique for eliminating vestiges of state-imposed segregation in student bodies.[20] If only two schools were involved in each group, it might be called, "pairing".

The number of schools involved in each cluster ranges from 3 to 7. The reason for the variance is the difference in the number of the students in the various schools. Each cluster includes an elementary school which has a predominantly black student body considered to have resulted from state-imposed segregation. It also embraces from 2 to 6 other elementary

[20]In connection with the discussion of "the principal tools employed by school planners and by courts to break up the dual system", Swann says: " . . . An additional step was pairing, 'clustering' or 'grouping' of schools with attendance assignments made deliberately to accomplish the transfer of Negro students out of formerly segregated Negro schools and transfer of white students to formerly all-Negro schools . . . " 28 L. Ed. 2d, at 573.

schools which are predominantly white. All kindergarten and first grade pupils attend the elementary school nearest their homes on account of the fact that they are usually only 5 to 6 years old.[24] All second grade pupils in the cluster zone will attend class at the heretofore predominantly black school. The third, fourth and fifth graders will go to class at the heretofore predominantly white schools in the cluster. While free bus transportation will be available to those students who desire to use it; none of them will be required to ride the bus. They will be at liberty to continue to go to their respective schools in their cluster by their present mode of travel, whether it be by car pool or something else.

The expected effect of the cluster plan on the racial distribution of the pupils in the schools involved is shown in great detail in Defendants' Exhibit 5. The result will be that the ratio of black to white students in each school in the cluster will approximate the overall ratio of black to white students in the entire school district.

Efforts to avoid the cluster plan will be defeated by the proposed rule that "students living in zones having clusters will not be granted transfers except under the majority-to-minority rule."[25]

After the child completes his work in elementary school, his school assignment will be made under the provisions of the option, feeder and transfer plan heretofore explained.

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[24] ". . . It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students . . . " *Swann*, 28 L. Ed. 2d, at 575.

[25] The majority-to-minority rule is explained later in this opinion.

The plaintiffs' detailed objections to the student assignment plan actually boil down to these: (1) The plan does not achieve a ratio of white to Negro students in each school that will correspond to the overall ratio of white to Negro students in the entire district. (2) The plan will still leave some schools with racially disproportionate student bodies.

The first objection has no merit because there is no constitutional right to any particular degree of racial balance in public schools, and the Court would have no authority to engraft it upon the student assignment plan.[27] ". . . The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Swann*, 28 L. Ed. 2d, at 571. *Swann* takes notice of "the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city." 28 L. Ed. 2d, at 572. That is true of nationalities as well as races. There are several areas in widely scattered parts of Fort Worth which have heavy concentrations of Negroes; but that residential population pattern is something that lies beyond the jurisdiction of the school authorities.

The plaintiffs also object to the plan for student assignment on the ground that it will leave some schools with racially disproportionate student bodies. Eleven of those will be predominantly black schools.

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[27] ". . . If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse . . . " 28 L. Ed. 2d, at 571.

Two things must appear for this objection to defeat the plan? (1) The plan must contemplate the continued existence of some schools which are all or predominantly of one race.[28] (2) Such disproportionate racial composition must be due to state-enforced segregation.[29] The school authorities have the burden "to satisfy the court that this [all or predominantly one-race schools] racial composition is not the result of present or past discriminatory action on their part." *Swann*, 28 L. Ed. 2d, at 572. The Court has carefully scrutinized the situation in regard to the schools in question, and is of the opinion that the school authorities have discharged that burden. The evidence shows beyond question that the racial imbalance in these few schools is due to neighborhood residential patterns, and not to state-enforced segregation. I. M. Terrell School is a vocational high school. There are only two such schools in the whole system. They are fine schools. Each one of them is open to any student of any race residing anywhere in the school district. The other ten black schools involved were all white schools under the dual system. They have become predominantly black as a result of desegregation instead of segregation. There are several large industries in the Fort Worth area. The fast growth of the City has caused its population to be mobile. Some

[28]This alone is not enough. " . . . [I]t should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system which still practices segregation by law . . ." *Swann*, 28 L. Ed 2d, at 572.

[29]"Schools all or predominantly of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation." *Swann*, 28 L. Ed. 2d, at 572.

school zones which were almost all white a few years ago are now predominantly black. Some of them are more evenly mixed. *Swann* recognizes that it is possible for racial imbalance in schools to be due to many factors having no relation to state-enforced segregation. One of the factors it mentions is the neighborhood residential pattern. 28 L. Ed. 2d, at 572. When a school district has converted to the unitary system, as the one here has, neither "school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies." *Swann*, 28 L. Ed. 2d, at 575. The *Swann* case suggests that one of the best techniques for meeting this situation is the majority-to-minority transfer policy with free transportation to the transferring student and available space for him assured in the school to which he desires to move. 28 L. Ed. 2d, at 572. The school system has had a liberal majority-to-minority transfer policy, but in the past no transportation was provided; and also, transfer was not granted if space was unavailable. Those deficiencies are supplied in the presently proposed plan.

The Court is of the opinion that the proposed student assignment plan more than meets the requirement in *Swann* that "all vestiges of state-imposed segregation" be eliminated.

Other Requirements of Court of Appeals Order

The proposed comprehensive plan covers many other uncontroverted matters. It remains necessary to mention only that proper provisions are made to satisfy the order of the Court of Appeals in regard to con-

struction of new schools and to semi-annual reports.

* * * *

This opinion ought to show on its face that the Court has given careful and detailed study to the school problem here involved in an effort to meet its responsibility under *Swann* to mould a "reasonable, feasible and workable" plan "to the necessities of the particular case." The Court feels that the proposed plan, with the modifications herein mentioned, meets the test of operating under a racially unitary system with all vestigial effects of state-enforced discrimination eliminated. There is nothing in any of the cases that indicates that a school district has to be left in shambles to meet this test. The plan is expected to be reasonable, and the one here ordered is.

It has been mentioned earlier that the Court did not have the problem here that is faced in many of the other school cases. The school authorities have co-operated fully. They voluntarily converted to a unitary system four years ago. They did not have far to go to meet the requirements of the Court of Appeals' order of remand. Without being ordered to do so, they have been working for some time with a bi-racial committee composed of seven Negroes and two Mexicans. The proposed plan was submitted to that committee before it was filed in court, and the members offered no objections to it.

The language of *Swann* makes it clear that the courts want to get out of the school business; and that, once a school district adopts and operates under a bona fide unitary system devoid of racial discrimination, they have no desire to interfere with the school au-

thorities' "broad power to formulate and implement educational policy."

The Fort Worth school system is fortunate to have an administrative staff now that wants to be and is abreast of the times. The leaders are comparatively young. They are sincere and dedicated to the operation of an excellent school system within the framework of the law. The school board is composed of public spirited men who have met their responsibilities in spite of the criticism of many people who fail to realize that some of the objectionable techniques of implementation of desegregation are only interim measures which will not be necessary when the few lingering effects of racial segregation are gone. With the operation of the school system under the present plan as modified, the Fort Worth Independent School District will have eliminated all vestigal effects of racial discrimination in its schools and will have made a complete conversion to the unitary system. With that, according to *Swann*, "in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." 28 L. Ed. 2d, at 576.

Judgment will be entered in accordance with this opinion which will serve as the Court's findings of fact and conclusions of law under Rule 52(a), F.R. Civ.P.

Signed, July 30, 1971.

/s/ Leo Brewster
JUDGE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-288

W. S. POTTS, *et al.*,

Petitioners,

—VS.—

ARLENE FLAX, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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In the

Supreme Court of the United States

October Term, 1972

No. 72-288

W. S. Potts, *et al.*,

Petitioners,

—vs.—

Arlene Flax, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit filed July 14, 1972, as amended on July 27, 1972, is unreported and is reprinted in the Appendix to the Petition at pages A-1 through A-12. The opinion of the district court entered July 30, 1971 is unpublished and appears at pages A-14 through A-42 of the Appendix to the Petition.

Prior reported opinions in this case appear at 450 F.2d 1118 (5th Cir. 1971); 313 F.2d 284 (5th Cir. 1963); 333 F. Supp. 711 (N.D. Texas 1970); and 204 F. Supp. 458 (N.D. Texas 1962).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the Court of Appeals erred in holding that the Fort Worth school system was not yet unitary, where nearly 57% of its black students attended virtually all-black schools.

2. Whether the Court of Appeals erred in overturning the district court's action exempting all first graders from inclusion in the desegregation process irrespective of the particular time or distance any individual student or group of students of any age might have to be transported.

3. Whether residential segregation in Fort Worth, which predated the commencement of this litigation and which continues virtually unabated to any substantial degree, excuses the school authorities from dismantling segregated units of their former dual school system which are located in segregated neighborhoods.

4. Whether Section 803 of the Education Amendments of 1972, P.L. 92-318, applies to district court orders designed to remedy unlawful segregation and not to achieve racial balance.

5. Whether a class action to desegregate the public schools may be maintained.

Statement of the Case

The section of the Petition entitled "Statement of the Case" (pp. 6-14) is, to quote another district court, a "mishmash and embranglement"[1] of fact, argument and conclusion dealing with matters within and without the record, some litigated and some ignored by Petitioners below, and either relevant or irrelevant to a consideration of this matter. Respondents will make no attempt to contradict every misrepresentation. The uncontested facts are that this lawsuit to desegregate the public schools of Fort Worth, Texas was commenced in 1959 and followed a now familiar course through freedom of choice and other ineffective desegregation plans. In 1970, the district court denied relief sought by plaintiffs with the filing of a motion for further relief; following this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1 (1971), the Court of Appeals remanded for compliance with the principles enunciated in *Swann*. 450 F.2d 1118.

The Board then proposed a cluster plan involving some 27 elementary schools, designed to desegregate six virtually all-black elementary schools, and to produce desegregation at the secondary grade levels through the operation of a pre-existing feeder pattern determining attendance at middle and high schools based upon attendance at a particular elementary school. Kindergarten and first grade students were to be excluded from the desegregation clusters. The Board did not propose to take any steps to bring about substantial desegregation of other all-black or virtually all-black or all-white schools in the Fort Worth system.

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[1] *Acree* v. *County Board of Educ. of Richmond County*, 336 F. Supp. 1275 (S.D. Ga.), *aff'd* 458 F.2d 486 (5th Cir. 1972), *cert. pending*, Nos. 72-79 and 72-167.

Nevertheless, the plan was approved by the district court on the ground that Fort Worth had operated a unitary school system since a *Jefferson*[2] decree was entered in 1967; and that the black schools which were to remain unaffected by the desegregation plan did not owe their racial composition to any state action maintaining the dual school system—despite the fact that no substantial desegregation of Fort Worth schools occurred under freedom of choice.

Reasons Why the Writ Should Be Denied

I.

The Court of Appeals Correctly Interpreted This Court's Decisions in *Swann* and Companion Cases in Requiring Further Desegregation of the Fort Worth School System.

As we understand the Petition, the school board contends that the judgment below exceeds the remedial authority confirmed by *Swann* in several respects, each of which we discuss *seriatim*:

1. The school board agrees it must desegregate schools which were black before this suit commenced, and remained black through 1971-72. However, as to those schools which in 1971-72 were virtually all black, but had earlier been restricted to white students, the school board contends it has no constitutional obligation because the racial composition of these schools was determined by other than school board action (residential mobility) "after the dual

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[2] *United States* v. *Jefferson County Bd. of Educ.*, 372 F.2d 836 (1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied sub nom. Caddo Parish School Bd.* v. *United States*, 389 U.S. 840 (1967).

system had been voluntarily eliminated by the Board." (Petition, p. 4). The district court accepted this argument, but the Court of Appeals did not.

The initial difficulty with the hypothesis is that no affirmative action was taken by the Board to eliminate the black schools *which it agrees are vestiges of the dual system* (those included within its cluster plan approved by the district court) until the 1971-72 school year; thus, any changes in the racial composition of other schools did not occur "after the dual system had been . . . eliminated."[3] The Court of Appeals was plainly correct in rejecting the district court's holding that these schools' racial composition was the "result of desegregation instead of segregation" (A-39),[4] based as it was upon the district court's conclusion that Forth Worth had operated a "unitary" school system since free choice was instituted in 1967 (A-15). *E.g., Green* v. *County School Bd.*, 391 U.S. 430 (1968); *Hall* v. *St. Helena Parish School Bd.*, 417 F.2d 801 (5th Cir.), *cert. denied*, 396 U.S. 904 (1969). Further-

[3] In the district court and the Court of Appeals, the Board argued with little substantiation that the black schools it was not including in its desegregation plan had become black schools since 1967 (See A-39, where the district court distinguishes schools which were white "under the dual system," which the court held lasted until 1967, A-15; A-7, where the Court of Appeals summarizes the school board's contentions centering around the 1967 conversion to a "unitary" school system). However, in this Court the Board contends only—and rather vaguely—that some of the schools became identifiably black schools "between 1963 and 1970" (Petition, p. 14) while others "have been in the process" for "12 years"—or prior to the effective date of the first order in this case (See A-14). As we discuss in the text, *infra*, whenever those changes in racial composition did occur, they were accompanied by school board actions such as eliminating optional zones which kept white schools white until neighborhoods had completely changed, or reassigning black faculty to what was now to be a black school.

[4] Citations are to the Appendix to the Petition.

more, the Court of Appeals' review of the evidence convinced the panel that the schools had become identifiably black even prior to the year when the district court and the school board contended a unitary system had first been established (A-7).[5] Finally, although the Court of Appeals did not specifically discuss it, the record reveals the manner in which the school board contributed to the establishment of these facilities as black schools through manipulation of optional attendance zones, assignment of black faculty to match black student bodies, etc. There was no affirmative school board action to eliminate racially identifiable faculties, see *Swann*, 402 U.S. at 18, until 1971-72 (A-27 to A-29).

The arguments made by the Board have been rejected in other Circuits. *E.g., Kelley* v. *Metropolitan County Bd. of Educ.*, 463 F.2d 732, 744 (6th Cir. 1972) ("The fact that population shifts in the metropolitan school district have helped to some degree to change the racial composition of some schools during the course of litigation does not eliminate the duty of the school board to present a plan for a unitary school system"); *Clark* v. *Board of Educ.*, 426 F.2d 1035 (8th Cir. 1970); *Dowell* v. *Board of Educ.*, No. 72-1146 (10th Cir., August 4, 1972).

2. The school board argues that the Court of Appeals erred in requiring the desegregation of three schools which are located in segregated black neighborhoods (Petition, p. 13) which, it suggests, result solely from the exercise of choice by blacks. Putting to one side the total lack

[5] The Court of Appeals' reference to "nine of the eleven elementary schools" (A-7) does not indicate that the other two were not identifiably black schools before 1967, but only that they were not "virtually all-black," words which have become a phrase of art in the Fifth Circuit indicating schools 90% or more black. See A-6, n.6.

of any credible evidence introduced by the Board below to substantiate such a claim, the Court of Appeals' out-of-hand rejection of this contention (A-8) as a matter of law is warranted by the decision in *Swann* and other precedent. *E.g., Henry* v. *Clarksdale Municipal Separate School Dist.*, 409 F.2d 682 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969). Residential segregation in Fort Worth predates this lawsuit and the school board was well aware of it in designing its segregated "neighborhood" zones.[4] But desegregation plans "cannot be limited to the walk-in school." *Swann*, 402 U.S. at 30.

3. The school board seems to argue, finally, that the judgment below exceeds the *Swann* guidelines of practicality and feasibility because of the burden upon the school system (Petition, pp. 13-14). Apart from the rather astounding inflation in the board's estimates of required transportation facilities (between the time when the school officials thought they had about a month to design and implement an effective plan, and the time when they were granted an additional semester within which to complete the process), the hardship claims are at this time entirely unsubstantiated. The school board has not yet filed a plan in accordance with the remand instructions below, nor have any hearings been held. The board will have available to it when it does so, guidelines recently issued by the Fifth Circuit *en banc* for the preparation of desegregation plans so as to minimize pupil transportation and expense. See *Cisneros* v. *Corpus Christi Independent School Dist.*, No. 71-2397 (5th Cir., August 2, 1972). In the absence of a

[4] Thus, for example, the school board defended its proposal to build a segregated high school in the all-black Morningside area on the grounds that this community was enttiled, like all others in Fort Worth, to have its own segregated schools. See 333 F. Supp. 711, *construction enjoined*, 450 F.2d 1118.

concrete desegregation plan given court approval and direction for implementation, one may hardly make a judgment that the practical limitations recognized by *Swann* have been ignored!

II.

The Court of Appeals Properly Required the Inclusion of First Grade Students in the Desegregation Process.

Petitioners can suggest no compelling reason for the blanket exclusion of first grade students from the desegregation process which was accepted by the district court. Certainly there is nothing in the record as it now stands to suggest that any first grade student would have to be transported 20 miles; should that eventuality come to pass, the particular circumstances can be considered in light of this Court's recognition in *Swann* that the age of the student is a factor to be taken into account in determining feasibility and practicability of desegregation plans utilizing transportation.

First grade students were historically part of school district segregation plans which often required blacks to attend distant segregated facilities, and first grade students have routinely been included in many desegregation plans approved by this Court and the lower federal courts, including those in Charlotte, Mobile, Emporia and Scotland Neck.[7] In addition, other Circuits which have addressed the issue have rejected the contentions pressed

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[7] *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Davis* v. *Board of School Comm'rs*, 402 U.S. 33 (1971); *Wright* v. *Council of the City of Emporia*, 407 U.S. 452 (1972); *United States* v. *Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972).

by the Board. *Clark* v. *Board of Educ. of Little Rock*, No. 72-1406 (8th Cir., August 21, 1972); *Thompson* v. *School Bd of Newport News*, No. 71-2032 (4th Cir., August 2, 1972).

III.

The Court of Appeals Properly Required Desegregation of the Vocational-Technical Schools.

The district court permitted the continued operation of I.M. Terrell (High) School as an all-black facility, which it found was one of "only two such [vocational high] schools in the whole system" (A-39) because the two vocational schools were open to enrollment by all students. This reliance upon a free choice situation despite its ineffectiveness is clearly insufficient. *Green* v. *County School Bd., supra,* and the Court of Appeals properly required desegregation of the technical schools (A-8).

The Court below has not, as the Board argues (Petition, pp. 4, 12-13), required that black students be deprived of a vocational education. Indeed, any plan to "desegregate" Terrell by denying black students the right to vocational training would be unconstitutional. See, *e.g., Harrington* v. *Colquitt County Bd. of Educ.*, 460 F.2d 193, 196 n. 3 (5th Cir. 1972). All that the Court below has required is that the Fort Worth school system's vocational and technical courses of study be desegregated.

IV.

Section 803 of the Education Amendments of 1972 Has No Application to This Case.

Petitioners have not sought a stay of the judgment below. Under the normal schedule of this Court, it is entirely possible, and likely, that ultimate review by this Court will be foreclosed by denial of this Petition prior to the scheduled implementation of desegregation in Forth Worth pursuant to the judgment below. Under these circumstances, Section 803 of the Education Amendments of 1972, P.L. 92-318, has no application here.

Furthermore, for the reasons stated by Mr. Justice Powell in *Drumond* v. *Acree,* No. A-250 (September 1, 1972), that section does not apply to the decrees below, which are designed to achieve desegregation of a formerly dual school system rather than a racial balance.

V.

There Is No Viable Class Action Issue.

Finally, the Board argues for the first time in this Court that there is a standing problem. The argument is that, the original named plaintiffs in this class action no longer attending Fort Worth schools, the real plaintiff is the "NAACP of New York" which has no standing to prosecute the lawsuit.

The facts are these: of the two original plaintiffs, one testified (without any indication that he understood the technicalities of class action suits in federal court) that he was prosecuting the case for his own children only (in reality, he was hesitant to "speak for" others); the other

was not questioned on the subject. The Court of Appeals held the case was properly brought as a class action. 313 F.2d 284. In 1967, the children of the Fort Worth attorney representing the original plaintiffs intervened as plaintiffs in the suit; they remain in Forth Worth and are eligible to attend the Fort Worth public schools.[8] Finally, respondents are preparing the necessary papers at this time to intervene additional infant children attending Fort Worth schools as plaintiffs in the district court so as to remove any doubt whatsoever. But as another Court of Appeals has said in rejecting a similar claim,

> . . . we note that this issue was clearly waived by failure of appellants [the school board] to raise it prior to trial and final adjudication of this case.
>
> We also note that such a class action as this dealing with continuing constitutional violations does not become moot because of years of delay (much of it attributable to appellants) which occasioned the graduation of the named, original student plaintiffs from the school system before final decision.

Kelley v. *Metropolitan County Bd. of Educ., supra,* 463 F.2d at 743.

[8] These children today attend non-public schools, but they remain eligible to enroll in Fort Worth public schools and continue to have an enforceable interest in the constitutional operation of the public school system. *Cf. Kramer* v. *Union Free School Dist.,* 395 U.S. 621 (1969).

CONCLUSION

WHEREFORE, for the foregoing reasons, respondents respectfully pray that the Writ be denied.

Respectfully submitted,

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